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Clements v. Utah State Tax Commission : Reply Brief

Utah Court of Appeals

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Marilyn M. Branch
Clerk of the Court

IN THE COURT OF APPEALS
OF THE STATE OF UTAH

WILLIAM G. CLEMENTS and
KATHLEEN K. CLEMENTS,

Petitioners/Appellants

vs.

UTAH STATE TAX
COMMISSION,

Respondent

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CASE NO. 940664-CA
PRIORITY 14

PETITION FOR REVIEW OF
DECISION OF UTAH STATE
TAX COMMISSION

REPLY BRIEF OF PETITIONERS

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Petitioners William G. and Kathleen K. Clements, by and through counsel, and pursuant to Rule 24, Utah Rules of Appellate Procedure, respectfully submit the following Reply Brief in support of their Petition for Review of the Findings of Fact, Conclusions of Law and Final Decision of the Utah State Tax Commission.

ARGUMENT

In order to create a new domicile, the previous domicile must be abandoned. Petitioner William Clements did not abandon his Wyoming domicile, and there is no evidence in the record, and the Tax Commission made no finding, that Bill Clements ever abandoned his domicile in Wyoming. In attempting to address the abandonment issue, the Utah State Tax Commission merely presents a series of circular, contradictory and conclusory statements regarding domicile. Similarly, the Commission's response to the lack of findings or conclusions of law regarding an intent to evade income tax fails to point to any evidence or findings regarding such intent, other than the fact that the Petitioners previously lived for seventeen years in the State of Florida, a state which does not have income tax. The Commission nonetheless concludes that there was substantial evidence to support its decision that Petitioners had the intent to evade income tax. Finally, without citing any authority in support of any of its argument, the Commission responds that the Tax Commission properly excluded the Petitioners' proffered evidence, properly cut off direct examination and properly refused to dismiss Kathleen Clements from the action. Such a response is typical of the Tax Commission's conclusory treatment of the issues in this matter.

1. **THERE IS NO BASIS ON WHICH TO CLAIM THAT MR. CLEMENTS ABANDONED HIS WYOMING DOMICILE**

In the Tax Commission's Findings of Fact, Conclusions of Law, and Final Decision (R.0020-0034, hereinafter "Findings," "Conclusions," or "Decision"), there is no finding as to the Petitioner's abandonment of his Wyoming domicile. The case law, the Restatement (Second) Conflict of Laws (hereinafter "Restatement"), and the Tax Commission's own Administrative Rule require that once a domicile has been established, in order to create a new domicile, there must be an abandonment of the old domicile, coupled with the intention to establish and the establishment of a new domicile. Texas v. Florida, 306 U.S. 398, 427 (1939); Utah Admin. Rule R865-9I-2(D); Restatement §19. Furthermore, "the burden of proof is on the party who asserts that a change of domicile has taken place." Restatement §19, Comment c. The Commission obviously does not assert that Utah was the Petitioners' domicile of origin; thus, it was the Commission's burden to establish that a change of domicile to Utah had taken place. 306 U.S. at 427. That burden has not been satisfied in this case.

The evidence before the Commission was clear that from 1970 until 1986, the Petitioners were domiciled in the State of Florida. Findings, R.0021. In 1984, the Petitioners purchased property in Bondurant, Wyoming; they began construction of a home on that property in the spring of 1985, and the home was completed by June of 1986. Findings, R.0021. In May of 1986, the Petitioners sold their home in Florida. Hearing Exhibit P-1. The Clements family then moved from Florida to their home in Bondurant. At the same time, the Petitioner William Clements

registered to vote in Wyoming, registered his automobile in Wyoming, obtained a Wyoming driver's license, joined the Bondurant, Wyoming Volunteer Fire Department, joined various other social committees in the Bondurant area, and the family moved into their 2,650 square foot new home in Bondurant. Hearing Exhibit P-1. During the summer of 1986, Mr. Clements was still flying out of Miami, Florida as his base of flight operations. The Clements family had no connection with Utah in 1986, other than the fact that Bill Clements was commuting to his Miami base via Salt Lake City, Utah, as evidenced by the parking permit that Mr. Clements obtained for the Salt Lake City Airport Employees Parking Lot. Hearing Exhibit P-3; Transcript at 42-43.

The Commission does not claim that the Petitioners were domiciled in Utah in 1986. The Commission does claim, however, that in 1986 Mr. Clements "manipulated" his domicile to avoid Utah income tax by doing all the things one does when moving to a new home: registering to vote, registering one's vehicle, getting a drivers license and becoming involved in the local community. The Commission now concedes that Petitioners were not domiciled in Utah until September 1987, more than a year after Mr. Clements moved to Wyoming. Brief of Respondent at 14 n.1.¹ What the Commission fails to establish, however, is

¹ It is interesting that this concession comes at this point, when Petitioners have been arguing all along that the Commission's determination of tax liability for all of 1987 is clearly erroneous. Up to this point, the Commission has insisted on maintaining the position that the Clements were domiciled in Utah during all of 1987. Now that this Court, rather than the Tax Commission, will be reviewing the evidence in this matter, the Commission is suddenly willing to make this concession. Petitioners feel that the concession coming at this late date is evidence of the Commission's lack of good faith in dealing with the Clements family.

where Mr. Clements was domiciled between June 1986 and September of 1987. There is no evidence in the record establishing that Mr. Clements ever resided in Newnan, Georgia or that Mr. Clements continued to be domiciled in Florida. There is, however, substantial evidence to indicate that Mr. Clements was domiciled in Bondurant, Wyoming from and after the time that the family home in Florida was sold in the spring of 1986.

Faced with the reality that there is no finding as to Mr. Clements' abandonment of his Wyoming domicile, the Tax Commission argues that the Petitioners have failed to marshal the evidence in this case, which is incorrect; that there is no evidence in the record showing that Petitioner ever established his Wyoming domicile, which is clearly wrong; and, finally, that the finding that the Petitioner was a domiciliary of Utah as of September 1987 must mean that he had abandoned his Wyoming domicile by that time, which is, at best, simply circular reasoning. Brief of Respondent at 16-17, 19-20. Such arguments are without merit.

Despite the Tax Commission's statement to the contrary, the Petitioners did in fact marshal the evidence in this case. Brief of Petitioners at 9-14, 17-25, 33-38. Because the concept and the process of marshaling evidence are very difficult, and frequently appellants have trouble meeting the marshalling burden, it is natural that the Respondent would make that statement. It is, however, an attempt to deflect the attention of this Court from the flaws in the Commission's findings. In fact, the Petitioners have marshaled the evidence and have established that the Tax Commission's findings are not supported by substantial evidence.

In First National Bank of Boston v. County Board of Equalization of Salt Lake County, 799 P.2d 1163 (Utah 1990), the court defined substantial evidence as “that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion.” Id. at 1165. “[T]he party challenging the findings - in this case, the taxpayer - must marshal all of the evidence supporting the findings and show that despite the supporting facts, the Tax Commission’s findings are not supported by substantial evidence.” Id. In that case, the court held that the Tax Commission’s findings were inconsistent with the evidence presented. Similarly, in this case, the evidence shows that Mr. Clements established a domicile in Wyoming in 1986, and that that domicile was never abandoned. The fact that Petitioner never abandoned his Wyoming domicile is the “fatal flaw” in the Tax Commission’s findings. See, West Valley City v. Majestic Investment Company, 818 P.2d 1311, 1315 (Utah App. 1991).

In summarizing its arguments, the Tax Commission states that, “the fact that William Clements abandoned his alleged domicile in Florida, Georgia, or Wyoming prior to his establishment of domicile in Utah in late 1987 is clear from the evidence in this case.” Brief of Respondent at 13-14. The Tax Commission then argues:

As there is no evidence in the record to establish that Petitioner ever established a Wyoming domicile, the Tax Commission was not required to specifically find that Petitioner abandoned that domicile. Further, the finding that Petitioner was domiciled in Utah inherently establishes that Petitioner had abandoned his Wyoming domicile.

Brief of Respondent at 19-20. However, “after domicile has been established, two things are necessary to create a new domicile: first, an abandonment of the old domicile; and second, the intention and establishment of a new domicile.” Utah Admin. Rule R865-9I-2(D) (emphasis added). Once again, by strenuously asserting the existence and creation of a new domicile, the Tax Commission ignores the abandonment requirement, on which the Tax Commission bears the burden of proof. Restatement §19, Comment c.

In 1986, when he left Florida after living there for seventeen years, Mr. Clements registered to vote in Wyoming, registered his car in Wyoming, joined local community organizations, obtained hunting and fishing licenses in Wyoming, obtained a driver’s license in Wyoming, and moved his personal belongings to Wyoming. Hearing Exhibit P-1; Transcript at 36-37. This happened more than a year before the Tax Commission claims Bill Clements became domiciled in Utah. Nonetheless, the Tax Commission argues that “in determining domicile, factors such as social activities carry more weight than factors such as where one is registered to vote. This is presumably so because the former factors are less easily manipulated than the latter.” Brief of Respondent at 18 (citation omitted). However, the Commission presented absolutely no evidence of any such social activity on Mr. Clements’ part in the State of Utah. In contrast, Mr. Clements presented evidence as to his involvement in the Bondurant, Wyoming community, beginning in 1986. See Exhibit P-1, Response to Interrogatory No. 25, Respondent’s First Set of Interrogatories, R.100; Clements Deposition, 69-73.

The instant case is easily distinguished from the recent Utah cases regarding Utah state tax liability. In Lassche v. Utah State Tax Commission, 866 P.2d 618 (Utah App. 1993) and Orton v. Utah State Tax Commission, 864 P.2d 904 (Utah App. 1993), this Court affirmed decisions of the Utah State Tax Commission in which the Commission found that the petitioners were domiciliaries of the State of Utah. In both of those cases, however, the petitioners were originally domiciled in Utah, and they filed their tax returns listing Utah as their home address. Additionally, in Lassche, the husband returned home “almost every weekend.” 866 P.2d 619-620. In Orton, Mr. Orton stayed in an out-of-state dormitory which he rented for \$21.00 per month, he listed his Nevada expenditures as “away from home” expenses on his tax forms, and when he left his job in Nevada, he returned to and then retired in Utah. 864 P.2d at 906. In contrast, prior to 1986, Mr. Clements had absolutely no contact with the State of Utah, and in 1986 his contact consisted of parking in the Salt Lake City Airport Employees Parking Lot on his way in and out of Salt Lake City to his flight operations bases in Florida and Georgia. Hearing Exhibits P-2, P-3. Additionally, prior to 1986, the Clements filed their income tax in Florida and then from 1986 forward, the Clements filed their income tax listing Wyoming as their residence and domicile, see Hearing Exhibit P-1; Mr. Clements has never registered to vote or voted in the State of Utah, and Mr. Clements resides in a fully furnished, 2,650 square foot home that he and his wife built in 1985 in Wyoming. Hearing Exhibit P-1.

The Tax Commission also attempts to equate the instant case with O'Rourke v. Utah State Tax Commission, 830 P.2d 230 (Utah 1992). The only true similarity between the facts in this case and in the O'Rourke case is the fact that Mr. O'Rourke was and Mr. Clements is an airline pilot and both commute long distances to their bases, as do many airline employees. Beyond that, however, the similarity stops. As the Tax Commission points out in its Brief at 19, Mr. O'Rourke registered his vehicles in Utah, filed his federal income tax returns as a Utah resident and paid in-state resident tuition for his daughter to attend college. The O'Rourkes moved Mr. O'Rourke's parents to Utah and bought a house for them, in addition to the Salt Lake City house that the O'Rourkes bought and lived in. During the period of the Tax Commission's audit, Mr. O'Rourke had several bases of operation: one in New York, one in Houston, and one in Atlanta. "O'Rourke would typically rent an apartment in these locations and return to his family on the days he was not working." 830 P.2d at 231. In contrast, Mr. Clements lives in his Bondurant home, spends more than twice as much of his free time in Wyoming as he spends in Utah, Hearing Exhibits P-37, P-38, P-39, and his family spends at least eight days a month (approximately one-half of Mr. Clements' free time) in Wyoming. Transcript at 289.² Finally, the Tax Commission states that, "in an attempt to manipulate his domicile, Petitioner obtained a Wyoming driver's license, registered his car in

² The evidence that was improperly refused admission by the Tax Commission at the hearing below, would additionally have shown that Mr. Clements would not have been able to get in-state resident tuition or similar benefits available to Utah residents. See proffered exhibits P-23, 24, 25, 26, 27, 28, 29 and 31; Transcript at 86-94.

Wyoming, registered to vote in Sublette County, Wyoming, and filed federal income tax returns from Wyoming.” Brief of Respondent at 20. What the Tax Commission fails to point out, however, is that all of those activities took place in 1986, Hearing Exhibit P-1, at a time when Mr. Clements had no contact with the State of Utah, had sold his prior home in Florida, and had built a substantial home in the State of Wyoming. Similarly, at that time, Mr. Clements had no idea that his employer, Delta Airlines, would purchase Western Airlines the following year. If those activities were attempts to manipulate domicile, it would appear that almost any person who sells a residence, moves to a new state and settles in that state is manipulating his or her domicile. That is obviously not the case.

Under the heading “Additional Evidence” the Tax Commission highlights the evidence that was received in this case regarding the amounts of automatic teller machine transactions, credit card transactions and checking transactions by both Mr. and Mrs. Clements. Brief of Respondent at 12-13. This evidence is, however, consistent with the conclusion that Mr. Clements is domiciled in Wyoming, while his wife and daughter reside in Utah so that Wendy Clements can attend an excellent school in Park City. There was no dispute as to the evidence that Kathy Clements handles virtually all of the family’s affairs, and that it is she who writes the vast majority of checks, makes the major purchases and keeps things in order. Transcript at 57-58, 290-296. The fact that most of the family documents list Mrs. Clements’ address in Utah is consistent with the reality that she is the one who handles all of the family’s paperwork because Mr. Clements flies for approximately one-half of

every month and is unable to take care of those things. Transcript at 291. Had the Commission taken the opportunity to review the history of this family, they would no doubt have discovered that for over 20 years the majority of their checks were written by Kathy Clements. Furthermore, it should not be surprising that the majority of purchases made by this family are made in Utah which is where the mother and the teenage daughter reside a majority of the time. Park City is a suburban area in close proximity to Salt Lake City, a large metropolitan area, whereas Bondurant, Wyoming is a somewhat remote and rural area. The opportunities for expenditure of money are clearly greater in the Utah area. All of this is consistent with the fact that from the fall of 1987 forward, Wendy and Kathy Clements resided in Park City, Utah during the school year. However, the fact that Wendy and Kathy reside in Park City does not establish that Bill Clements is domiciled in Utah. “A person’s domicile does not shift to a new location merely because his wife, or some other member of his household has gone there to live.” Restatement §16, Comment d.

In this case, the Tax Commission relies heavily on the argument that Mr. Clements’ registration of his vehicles in Wyoming, his registration to vote in Wyoming and his having established a residence in Wyoming are factors which are “subject to manipulation.” See Brief of Respondent at 18, 22, 28. In Allen v. Greyhound Lines, Inc., 583 P.2d 613 (Utah 1978), however, the Utah Supreme Court relied on virtually identical factors to establish domicile. In affirming the trial court, the Supreme Court noted,

Plaintiff readily admits: (1) having established a residence in Montana; (2) having become a member of a church congregation in Montana where she pays tithes; (3) not paying resident of Utah income taxes; (4) having licensed a vehicle in Montana and paying license fees and personal property taxes thereon; and (5) being a registered voter in Montana and exercising her voting privileges there.

The controversy as to domicile arises simply by reason of plaintiff's declaration that she is still a Utah domiciliary and that at some indefinite time in the future she intends to return to Utah and again reside here.

Faced with the foregoing facts, the trial judge determined that plaintiff's residence in Montana, coupled with her intention to remain for an indefinite period of time, constituted the establishment of domicile.

Id. at 614 (citations omitted).

Every one of the five elements in Allen (with the exception of tithing) applies equally to Mr. Clements: one merely has to substitute "Wyoming" for "Montana". However, it is apparent that in this case, the Tax Commission has chosen to disregard the factors on which the Supreme Court relied in Allen. The Commission's "substantial evidence" in this case is therefore highly questionable.

2. THERE IS NO EVIDENCE IN THE RECORD AND NO FINDING THAT MR. CLEMENTS HAD THE INTENT TO EVADE INCOME TAX.

A finding of negligence, intent or fraud is "necessary to justify a penalty under Section 59-1-401(3)." Union Pacific Railroad Co. v. Auditing Division of the Utah State Tax Commission, 842 P.2d 876, 887 (Utah 1992). In making its 39 individual Findings of Fact, the Tax Commission made no finding as to Bill Clements' intent to evade income tax. Conclusions R.0020-0027. Nor did the Commission make a Conclusion of Law as to Bill Clements' intent. Findings R.0027. Nonetheless, in

its decision, the Tax Commission stated that, “It is also clear that the Petitioner held himself out to be a resident of the State of Wyoming with the intent to evade the income tax due the State of Utah and therefore is subject to a penalty in the amount of \$500.00 per period or 50% of the tax due pursuant to Utah Code Annotated §59-1-401(3)(c).” Decision R.0032-0033.

In its Brief, the Commission unsuccessfully attempts to supply the missing basis for the Commission’s Decision.

In this case, Petitioner’s intent may be inferred from the surrounding facts. Petitioner has an interesting history of gravitating to states without state income tax. However, Petitioner’s family, which has no income, always seems to be located near an airport where Petitioner is based. Before Petitioner brought his family to Utah, Petitioner lived in Florida which has no state income tax. When Petitioner was based in Georgia, which has state income tax, his family lived in Newnan, Georgia and Petitioner claimed to live in Wyoming, which has no state income tax. The same pattern continued when Petitioner brought his family to Utah. Based upon the facts in this case, coupled with Petitioner’s history, there was substantial evidence before the Tax Commission to support its conclusion that Petitioner consciously sought to evade income taxes.

Brief of Respondent at 23. Other than the fact that Petitioners have lived in Florida for seventeen years and now Wyoming for eight years, two states without state income tax, the Commission has no basis, let alone substantial evidence, to support its decision. Residence in Florida and Wyoming is neither illegal, nor evidence of intent to evade tax.

In 1970, Petitioner was assigned to fly out of Miami, Florida by his employer, Delta Airlines. Petitioner and his wife remained residents of Florida until 1986. By

that time, the Clements were ready to move out of Florida, largely for the sake of their daughter Wendy. Transcript at 32, 276-279. In 1984, the Clements had found the Wyoming property and they built a home in Bondurant, which was completed in 1986. During the summer of 1986, after the Florida house had been sold and Wendy Clements had finished school for the year, the family moved to Bondurant, Wyoming. Hearing Exhibit P-1. Because Kathy Clements did not want her daughter to attend the one-room schoolhouse in Bondurant, the Clements decided to have their daughter go to school in Newnan, Georgia. Thus, in the fall of 1986, Bill Clements got a transfer to fly out of Atlanta, Georgia. Hearing Exhibit P-2. By the end of 1987, Kathy Clements was very unhappy in Georgia, Transcript at 285-86, so the family decided that Wendy could go to school in Utah and Bill could continue to live in Bondurant. Transcript at 288. In September of 1987, Kathy and Wendy Clements moved to Park City, Utah. Hearing Exhibit P-1. On November 1, 1987, Bill Clements' flight base was transferred to Dallas/Fort Worth in Texas. Hearing Exhibit P-2. By that time, Delta Airlines had purchased Western Airlines and had established a hub in Salt Lake City. When Delta bought Western, approximately 45% of the airline employees based in Salt Lake City were commuters, meaning that the airline employees flew into Salt Lake City from other areas around the country. See Transcript at 28. Because pilots can fly for free or for minimal charge, a pilot can commute hundreds or thousands of miles to his or her base of flight operations. Cf. O'Rourke v. Utah State Tax Commission, 830 P.2d 230, 231 (Utah 1992). Thus, it is common practice for airline employees to commute huge distances to

their base of operations. Transcript 27-29. Bill Clements did not even begin to fly out of Salt Lake City as his base of flight operations until the spring of 1988, Hearing Exhibit P-2, which was seven months after the Commission contends that Mr. Clements became a domiciliary of Utah.

In making an inference of Bill Clements' intent, the Commission appears to be stating that gravitating to a state that does not have income tax is somehow improper. Although "gravitating" is an unusual term to describe the Petitioners' seventeen year residence in Florida, the Petitioners are unaware of any impropriety involved in living in a state that does not impose a state income tax. It is perfectly appropriate for a person to wish to avoid paying income tax. However, the Commission appears to ignore the difference between the desire to avoid income tax and the intent to evade income tax. "'Evade' is defined as avoidance of something by effort, skill, dexterity, contrivance, subterfuge, ingenuity or artifice." Silver v. Auditing Division of the State Tax Commission, 820 P.2d 912, 915 (Utah 1991) (citation omitted). Wishing to avoid tax, which Mr. Clements readily admits, as would the rest of the population, cannot be equated with the intent to evade tax.

"'Intent to evade' means consciously desiring 'to avoid a legal requirement with which the actor knows he or she is obligated to comply; it is not sufficient that the actor merely intends not to do that which the law, in fact, may require,'" Jensen v. State Tax Commission, 835 P.2d 965, 972 n.4 (Utah 1992) (quoting Silver v. Auditing Division of State Tax Commission, 820 P.2d 912, 915 (Utah 1991)). In Silver, the Utah Supreme Court determined that the term "intent to evade" was

equivalent to fraudulent intent, such that before the related penalty can be imposed, “there must be a showing of what can be characterized as a fraudulent intent to avoid the requirements of the tax act.” 820 P.2d at 915-916 (construing a prior statute). (see, Jensen, 835 P.2d 942 n.4 for explanation of legislative history). In this case, the Tax Commission had the burden to prove that Bill Clements actually had the requisite intent to evade tax. However, where non-payment of taxes is based on a “good faith interpretation of an arguable point of law,” Hales Sand & Gravel v. Audit Division of the State Tax Commission of Utah, 842 P.2d 887, 895 (Utah 1992), or a “good faith dispute, even though [the taxpayer’s] position was wrong,” Chicago Bridge & Iron Co. v. State Tax Commission, 839 P.2d 303 (Utah 1992), it is error to impose a penalty.

As in Jensen, Silver and Chicago Bridge & Iron, there are no facts in this case to support the Commission’s decision as to intent. In Jensen v. State Tax Commission, 835 P.2d 965 (Utah 1992), the Utah Supreme Court upheld the Tax Commission’s imposition of a penalty based on the existence of fraud with intent to evade tax. Although the Court stated that such intent may be inferred, the inference must be reasonable. See, id. at 973. Relying on a United States Supreme Court case, Spies v. United States, 317 U.S. 492, 499 (1943), the Utah Court looked for evidence of double bookkeeping, falsification of books, invoices or documents, destruction of records and similar conduct designed to mislead or conceal. On that basis, Jensen’s intentional failure to file tax returns and failure to keep any business or income records were substantial evidence of Jensen’s fraud with intent to evade

income tax. 835 P.2d at 974. There is not a shred of similar evidence in this case, and there is no evidence on which to base even an inference of the required showing of intent to evade.

Had the evidence in this case been as clear as the Commission has stated it was, certainly the Commission could and would have made a finding regarding Mr. Clements' intent. Because no such finding was or could have been made in this case, the Commission's decision as to intent to evade income tax must be reversed.

**3. IT WAS ERROR TO MAINTAIN THIS ACTION
AGAINST KATHLEEN CLEMENTS.**

Petitioners do not dispute that Kathleen Clements qualifies to be a "resident individual" for purposes of Utah state tax pursuant to Utah Code §59-10-103(j)(ii). To date, the Tax Commission has not assessed any tax as to Kathleen Clements, other than tax based upon income that was earned by William Clements. On those bases, Petitioners sought to have Kathleen Clements dismissed from this action. At the hearing in this matter, counsel for the Tax Commission refused to dismiss Mrs. Clements because "to the extent she has income - that will become the question as we move downstream once the residency issue is resolved." Transcript at 12. The Commission, however, did not put on any evidence of Mrs. Clements' income and such income, to this day, remains a wholly speculative matter. Therefore, the Petitioners' motion to dismiss Kathleen Clements from this action should have been granted.

In Jensen v. State Tax Commission, 835 P.2d 965 (Utah 1992), the court held that it was not the burden of a non-working spouse to establish that she does

not have income. Rather, “the Commission must first clearly establish that the taxpayer earned some taxable income and then show that its predicate for computing taxable income is not arbitrary or capricious. Here, there is not even a modicum of evidence that Mrs. Jensen earned income during the period in question.” Id. at 971. As in Jensen, in the instant case there was no finding that Kathleen Clements earned any income during the audit period. “Tax liability does not arise merely because one benefits from or is supported by someone else’s income. Tax liability arises from the earning of income.” Id. In the event that the Tax Commission is somehow able to establish that Mrs. Clements has income, at that time the Commission is free to take appropriate action. At this point, however, there is no basis on which Mrs. Clements can be a party to this action and the Commission’s refusal to dismiss her is error.

4. THE TAX COMMISSION CONTINUES TO IGNORE THE RELEVANT FACTS IN THIS CASE.

The Utah State Tax Commission has chosen this case to be a test case in order to further extend tax liability to commercial airline pilots who commute through Salt Lake City or who are assigned to Salt Lake City as their base of flight operations, while they live elsewhere. Transcript at 367. In the Commission’s eagerness to obtain a favorable ruling, the Commission has ignored key facts which are specific and relevant to this case. Instead, it has substituted evidence of lifestyle for hard facts regarding residence, and substituted inferences regarding personality for substantial evidence of intent. The Commission’s endeavor to establish this case as precedent cannot be successful.

Certainly Mr. Clements has contacts with the State of Utah, based in part upon the fact that his domicile in Wyoming is a rural and remote area. It is, however, close to a major metropolitan and resort community in Utah. The Commission has argued that all of Mr. Clements' physicians, dentists and other professionals are located in Utah. That is true, not because Mr. Clements is domiciled in Utah, but rather because the reality is that there are no qualified professionals to provide similar services in Bondurant, Wyoming. In all likelihood, when Mr. Clements resided in the Florida Keys, many of his professionals were located in Miami, where his base of flight operations was. The only difference, however, is that now when Mr. Clements must travel to see a doctor, or to leave on a trip, he must cross a state line. There is no reason why Mr. Clements should be required to only use professionals or to locate his base of flight operations in the same state where he lives. Nor can the Tax Commission penalize Mr. Clements for living in a rural and remote area. If Mr. Clements chooses to commute several hours to the Salt Lake City airport or, as is also the case, to commute to the Jackson, Wyoming airport to take a forty-five minute flight to Salt Lake City, that is Mr. Clements' choice. It is a lifestyle choice and just because it does not comport with the Tax Commission's traditional view of appropriate lifestyle, does not render the lifestyle incredible or invalid. Prior to moving to Bondurant, Wyoming, the Clements lived on an island in the Florida Keys. Does the Tax Commission find that similarly incredible?

Mr. Clements is not perfect, as the facts in this case indicate. Did Mr. Clements improperly obtain a duplicate Utah drivers license for which he did not receive any monetary gain? Yes. Did Mr. Clements obtain Utah hunting and fishing licenses, for which he saved some money? Yes. Following a telephone discussion with an employee of the Tax Commission, did Mr. Clements amend his corporate franchise income tax to reflect resident status in an attempt to avoid taxes on a company that had no income? Yes. And when Mr. Clements' accountant told Mr. Clements that the amendment was improper, did Mr. Clements make the necessary change 60 days later: Also yes. Unquestionably, Mr. Clements has tried to cut some corners. But those corners simply do not amount to evidence of intent to evade income tax. Realistically, if Mr. Clements had had the intent to evade income tax, it is inconceivable to think that he would have jeopardized his alleged income tax scheme by saving a few dollars on a hunting and fishing license or even a few hundred dollars on a corporate franchise tax. No one is here condoning the corners that Mr. Clements tried to cut. But those corners are issues properly addressed by the Division of Motor Vehicles and by the Division of Wildlife Resources, not by this Court.³

On appeal, the appellate court must review the "whole record" to determine whether there is substantial evidence to support the agency's action. First National Bank of Boston v. County Board of Equalization of Salt Lake County, 799 P.2d

³ In fact, when Mr. Clements told those agencies that he had obtained Utah licenses, both agencies declined to take any action against Mr. Clements.

1163, 1165 (Utah 1990). In this case the agency action is not based on substantial evidence, because the Tax Commission has chosen to focus only on certain evidence favorable to its own interest and position, emphasizing and exaggerating the significance of minor issues like the drivers and hunting licenses, while ignoring the realities that when people live in remote areas, they travel long distances to work and shop and see a doctor. Furthermore, families live apart when education, economics and certain responsibilities dictate. The law of domicile recognizes such realities, even if the Tax Commission prefers to ignore them. See, Restatement, §16, Comment d (“A person’s domicile does not shift to a new location merely because his wife or some other member of his household has gone there to live.”); §18, Comment f (no inference of change of domicile, when move is made for health, temporary job or to escape creditors); and example 11 (“A, a farmer, moves into a city in the autumn in order to place his children in good schools during the winter. These facts tend to show that A does not intend to make his home in the city and that his domicile remains unchanged.”) In this case, a review of the whole record shows that the Tax Commission has tunnel vision as to these Petitioners.

CONCLUSION

In 1986, Mr. Clements moved to Bondurant, Wyoming. His Florida home had been sold and the Commission presented no evidence that Mr. Clements was domiciled any place other than in Wyoming. Nor did the Tax Commission present any evidence to establish that Mr. Clements subsequently was domiciled in Georgia. For six months, Mr. Clements flew out of Georgia, but then for five months he flew


out of Texas. His base of flight operations did not change to Utah until 1988, two years after the Tax Commission alleges that Mr. Clements “manipulated” his contacts in Wyoming and seven months after the Tax Commission now claims that Mr. Clements became domiciled in Utah. Airline pilots and their families simply live a more mobile lifestyle than do many of the rest of us, even in this mobile society. The Restatement says that the fact that a person’s spouse and child have gone to live somewhere else, does not determine that person’s domicile. When part of a family lives in a different place, there are bound to be contacts with both places. However, there is substantial evidence of Mr. Clements’ domicile in Wyoming starting in 1986, and there is no evidence in this record, and there was no finding, that Mr. Clements ever abandoned his Wyoming domicile. On that basis, the Commission’s ruling that Mr. Clements is domiciled in Utah must be reversed.

Similarly, there is no evidence, and clearly no finding, that Mr. Clements had the requisite intent to evade income tax in this case. The Tax Commission was required to make a finding of intent to evade income tax in order to impose a penalty. The Tax Commission apparently was unable to find substantial evidence sufficient to support a finding of such intent and therefore did not make that finding. For some reason, however, the Tax Commission believed that it could gloss over the lack of a finding as to intent, and come to a decision based primarily on the Clements’ history of long term residence in states that do not impose income tax. That decision was in error.

The issue in this matter is the domicile of Mr. William Clements. Even the Tax Commission, in its findings, refers to Mr. Clements as "Petitioner." His wife, Kathleen Clements, spends more than 183 days in the State of Utah and therefore qualifies as a resident individual. There is no dispute on that matter. Because the hearing in this matter was held to determine the domicile of Mr. Clements and the Commission presented no evidence as to any income of Mrs. Clements, Mrs. Clements should have been dismissed from this action.

The entire tone of the proceeding below was punitive and castigatory. Even assuming that the personnel changes that occurred immediately following the formal hearing had no bearing on the issues presented, the decision in this matter reflects an attitude that is simply not supported by the evidence. There was no evidence to show that Bill Clements abandoned his Wyoming domicile in favor of Utah, there was no evidence of Bill Clements' intent to evade income tax, and there was no basis for the refusal to dismiss Kathleen Clements in this case. The decision of the Utah State Tax Commission must be reversed.

DATED this 22nd day of December, 1994.

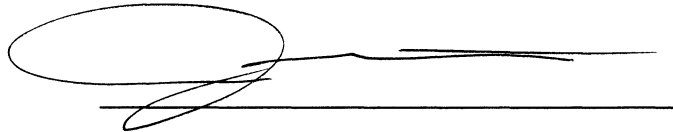


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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of December, 1994, I caused to be mailed, postage prepaid, a true and correct copy of the foregoing brief of Petitioner to the following:

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A handwritten signature in black ink, consisting of a large, loopy initial 'J' followed by a series of horizontal strokes, written over a solid horizontal line.